

WESLEY WISHKENO, ET AL.	:	Order Accepting Decision of
v.	:	Bureau of Indian Affairs
DEPUTY ASSISTANT SECRETARY—	:	Docket No. IBIA 82-40-A
INDIAN AFFAIRS (OPERATIONS)	:	February 16, 1983

In an opinion dated December 30, 1982, the Board of Indian Appeals remanded this case to the Deputy Assistant Secretary--Indian Affairs (Operations). 11 IBIA 21, 89 I.D. 655 (1982). The case involves an appeal of an April 5, 1982 decision of the Deputy Assistant Secretary which refused to give retroactive approval to a warranty deed of Indian trust land. The deed had been submitted to Administrative Law Judge Sam E. Taylor in the Departmental proceeding to probate the estate of Arthur Wishkeno. Because it had not been approved as required under 25 CFR Part 121, now Part 152, the Administrative Law Judge declined to give effect to the deed. On appeal, the Board referred the deed to the Commissioner of Indian Affairs for his consideration, staying further probate proceedings pending a decision on whether the deed should be retroactively approved. Estate of Arthur Wishkeno, 8 IBIA 147 (1980).

The Board issued its December 1982 opinion after reviewing the April 5, 1982 memorandum from the Deputy Assistant Secretary, to whom the responsibilities of the vacant office of Commissioner had been transferred, and the objections to that decision filed by appellants Wesley Wishkeno, Mary E. Wishkeno Delg, Alethia Wishkeno Bedwell, Virginia Wishkeno Cadue, and Wilma Wishkeno Anquoe. The opinion found that the ultimate decision as to whether or not the deed should be approved was within the discretion of the Bureau of Indian Affairs. However, Departmental practice and court decisions had created a legal framework to guide the exercise of that discretion. Because the Deputy Assistant Secretary's memorandum and the administrative record compiled upon referral did not disclose "any evidence of legally adequate grounds for denying approval of this conveyance," 11 IBIA at 33, 89 I.D. at 661, the Board remanded the case for supplementation.

On February 7, 1983, the Board received a memorandum signed by the Assistant Secretary--Indian Affairs and dated February 2, 1983. In that memorandum, a copy of which is attached to this decision and incorporated by reference, the Assistant Secretary found that after reconsideration of the facts of this case in light of the legal discussion in the Board's opinion, the warranty deed at issue should be retroactively approved.

The second decision memorandum clearly applies the legal standards recognized as controlling in the Board's opinion and addresses the specific facts of this case. Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to approve the warranty deed from Arthur Wishkeno to Virginia Wishkeno Cadue is accepted. ^{1/} This decision is incorporated into the record and final decision in Estate of Arthur Wishkeno, Docket No. IBIA 80-13, also issued today.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Jerry Muskrat
Administrative Judge

Franklin D. Arness
Administrative Judge

Attachment

^{1/} Because of the personal interest taken in this case by the Assistant Secretary--Indian Affairs, the 30-day period for filing exceptions to the Bureau's decision, given in the Board's opinion of December 30, 1982, 11 IBIA at 34, 89 I.D. at 662, is vacated. The Board does not have jurisdiction to review decisions of the Assistant Secretary--Indian Affairs except as those decisions may be referred to it on a case-by-case basis or through rulemaking. 43 C.F.R. 4.330; Nelvette Siemion v. Assistant Secretary for Indian Affairs, 11 IBIA 37 (1983); Kenneth Willie et al. v. Commissioner of Indian Affairs and Anne Begay v. Commissioner of Indian Affairs, 10 IBIA 135 (1982).

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Feb 2, 1983

Memorandum

To: Chief Administrative Law Judge, Board of Indian Appeals

From: Assistant Secretary - Indian Affairs

Subject: Retroactive Approval of Deed, Estate of Arthur Wishkeno--IBIA 82-40-A

By memorandum to the Chief Administrative Law Judge, Board of Indian Appeals, dated April 5, 1982, this office declined to approve a warranty deed executed by the decedent on November 1, 1968. The deed had never been submitted to the Secretary of the Interior or his delegate for approval, as required by statute and regulation. On December 30, 1982, your office remanded the matter to the Deputy Assistant Secretary for the issuance of a new decision stating that “. . . to be legally sufficient it should seek to apply the legal standards recognized in this opinion as controlling in cases where Secretarial approval of deed conveyances is sought after the death of the Indian grantor” (IBIA 82-40-A).

I previously declined to approve the deed on the basis that such retroactive approval would fail to bar possible equitable claims to title. Analyzing the matter on the principles of case law cited in your opinion, we have considered the following: (1) that an approval of the conveyance is a determination that the purposes for which the restrictions were imposed have been fully satisfied, (2) that the consideration is ample, (3) that the Indian grantor received it, and (4) that there is no unreasonable stipulations attending the transaction.

Although Bureau personnel were not privy to the events leading to the execution of the deed by Arthur Wishkeno, I am convinced that the transaction was handled in an atmosphere that would dispel any suspicions of overreaching or fraud. The grantor sought out and was represented by legal counsel. He is described as a person who had a mind of his own and knew what he wanted to do. Gift transactions to immediate members of a family are permitted by Bureau regulations; consequently, the matter of consideration becomes almost moot. The formality of a third party deed transaction in the presence of legal counsel and attested by affidavit of that counsel leads one to be satisfied that the transaction was aboveboard and not tainted with undue influence or fraud.

Accordingly, I have decided that the deed should be approved and, upon appropriate orders for final distribution of the estate, the Anadarko Area Director is instructed to approve the subject deed.